Supreme Court, U.S.
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No. 98-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VIRGINIE GSCHWIND, In Her Own Right and Administratrix of the Estate of Cyril Gschwind, Deceased, and as Parent and Natural Guardian of Alexandra Gschwind,

Petitioner,

v.

THE CESSNA AIRCRAFT COMPANY and PRATT & WHITNEY CANADA INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT PRATT & WHITNEY CANADA INC.

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STATEMENT PURSUANT TO RULE 29.6

The parent company for Respondent, Pratt & Whitney Canada Inc., is United Technologies Corporation and Respondent has the following nonwholly owned subsidiaries:

SPW International [s.a.s.];

South Pratt & Whitney Aeroengine Co. [zhuzhou] LTD.;

UT Insurance [Dublin] LTD.;

United Technologies Financial Services [Dublin].

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Rule:

Sup. Ct. R. 10 10

STATEMENT OF THE CASE

This product liability case arises from a plane crash that occurred in France. On the motions of defendants The Cessna Aircraft Company ("Cessna") and Pratt & Whitney Canada Inc. ("Pratt & Whitney"), the District Court of Kansas dismissed this action on the grounds of *forum non conveniens*. On September 18, 1998, the Tenth Circuit Court of Appeals affirmed the dismissal, finding that the District Court did not abuse its discretion in conducting its analysis under the well-settled guidelines set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) *and Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

On August 16, 1993, Cyril Gschwind, a French citizen living in Belgium, died when the Cessna Caravan 208B aircraft he was piloting crashed near Cannes, France. (Aplt. App. at 15). Decedent was the sole occupant of the plane. There may have been one eyewitness to the aircraft's descent and crash. (Aplt. App. at 348).

On the day of the crash, decedent faxed a handwritten note to a business associate named Peter Bennedsen, stating in part:

> I am obliged to take a flight today with which I don't feel comfortable at all. Should anything happen to me, and since you are the only person I trust, could you please: (1) wire back the extra money you receive from me [to a Swiss bank account] and (2) take care as best you can, of the interests of my small family (wife & baby).

(Aplt. App. 295).

The crash was investigated by the French government aviation investigators. (Aplt. App. at 184). These individuals and their records are located in France. (Aplt. App. at 184, 360). The French air traffic and radar controllers also possess evidence relating to the crash. (Aplt. App. at 184). The wreckage of the aircraft is still located in France. (Aplt. App. 336-37).

At the time of his death, decedent was the European distributor for Cessna Caravan aircraft. (Aplt. App. at 16, 179). Decedent's company, Aviation & Services Europe, had its offices in the city of Mandelieu, France. (Supplemental App. at 1). The majority of decedent's sales were in Europe, as were most of his financial records and business associates. (Aplt. App. 348).

Evidence calling into question the financial soundness of decedent's business at the time of his death also exists in France and other parts of Europe. Shortly after the crash, a lawsuit was filed in Cannes, France against decedent's company, Aviation & Services Europe, by a British company, Titan Airways Limited. (Aplt. App. 293-94).[1] This suit alleges that Titan contracted with decedent's business to purchase a Cessna aircraft, but that decedent's business failed to transfer Titan's funds to the seller of the aircraft. (Aplt. App. 293-94, 316). Witnesses who may have information bearing on the financial well-being of decedent's business just prior to decedent's death reside in France and other parts of Europe. (Aplt. App. 185-187).

Decedent's widow, a French national living in Belgium, brought a wrongful death suit in the Court of Common Pleas

1. Two untranslated pages of this lawsuit, enough to identify the parties, are included in the record. (Aplt. App. at 293-94).

for Montgomery County, Ohio on August 11, 1995. Plaintiff named as defendants: (1) Cessna, the Kansas corporation that manufactured the aircraft; (2) Pratt & Whitney, the Canadian corporation that manufactured the engine used in the aircraft; and (3) Hartzell Propeller Inc., an Ohio corporation that makes some (but not all) of the propellers for the Caravan aircrafts. (Aplt. App. 15).

Plaintiff candidly has stated that the reason she filed her lawsuit in the United States was to avoid delay. (Aplt. App. 209). According to plaintiff, if her case were tried in France, it immediately would have become a criminal case. *Id.* Financial compensation would only be part of a second lawsuit because in France the penal case stays the civil case until the criminal case is resolved. *Id.* Plaintiff also has stated that if her case were tried in France, it would have to be tried in a small French village that is not very accessible or open to foreigners. (Aplt. App. at 210).

The defendants removed the case to federal court based on the argument that Hartzell, a resident of the forum State, was fraudulently joined to destroy diversity. In her motion to remand to state court, plaintiff argued against federal jurisdiction solely with the argument that Hartzell was not fraudulently joined. The District Court for the Southern District of Ohio agreed that Hartzell was fraudulently joined and denied plaintiff's motion to remand.

Defendant Cessna then filed a motion to dismiss on the grounds of *forum non conveniens* or, in the alternative, for a change of venue to the United States District Court for the District of Kansas. Pratt & Whitney followed with a motion to dismiss for lack of personal jurisdiction or, in the alternative, for dismissal based on *forum non conveniens*.

Cessna provided documentary evidence in support of its motion to dismiss on *forum non conveniens* as attachments to its reply briefs. (Aplt. App. 45-46, 65-68, 293-300).

The Magistrate handling the case in the Southern District of Ohio recommended that defendants' *forum non conveniens* motions be denied. (Aplt. App. 302-05). The Magistrate did, however, grant the alternative request of a transfer to the District of Kansas. (Aplt. App. 329-30). Cessna and Pratt & Whitney each filed objections to the Magistrate's Report and Recommendations regarding *forum non conveniens* and moved for an interlocutory appeal on this issue. (Aplt. App. at 310-12, 313-28). In the meantime, the case was transferred to the District Court of Kansas. (Aplt. App. 329-30).

After transfer, the District Court of Kansas reviewed defendants' motions to dismiss based on *forum non conveniens*. On March 19, 1997, the District Court issued a comprehensive 31-page memorandum and order granting defendants' motions to dismiss. (Aplt. App. 341-371). The District Court began its analysis by noting that while defendants have the burden of proving that an alternative forum exists and that the case should be dismissed for *forum non conveniens*, they need not "submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum." (Aplt. App. 352, *citing*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981)). Instead, the court noted that defendants "need only provide sufficient information to enable the court to balance the parties' interests." *Id.*

The District Court then considered the question of whether an available alternative forum exists for this case.

The court found that because defendants consented to jurisdiction by the French courts and because plaintiff did not deny that she could have brought her suit in France, an available alternative forum does exist in France. (Aplt. App. 353-54).

The District Court next conducted its choice of law analysis. Since the place of injury was France, the court began with the presumption that French law governs. (Aplt. App. 355). The court then analyzed the relevant factors under the Restatement (Second) of the Law of Conflicts to determine if that presumption could be rebutted. As to the situs of tortious conduct, the court found that this factor may favor application of the law of Quebec, Ohio, or Kansas. (Aplt. App. 355-56). The court found the factor of the domicile, residence, nationality, place of incorporation, and place of business of the parties to be inconclusive when considered independently. (Aplt. App. 356). However, when combined with the factor of location of the relationship between the parties, the court determined that these two factors strongly favored application of French law. (Aplt. App. 356). The court also found that the relevant policies of the two jurisdictions and the ease in determining and applying choice-of-law rules weighed in favor of the application of French law. (Aplt. App. 356-359). After weighing these factors, the court concluded that the local law of France would govern plaintiff's suit.

The District Court then proceeded to consider in detail each of the relevant private and public interest factors set forth in *Gulf Oil*. (Aplt. App. 360-69). After balancing these factors, the court concluded that the public and private interest considerations clearly favored trial in France. (Aplt. App. 369). The court held that defendants' motions should be granted because plaintiff had offered no satisfactory reason

for bringing the instant litigation in Ohio or continuing the litigation in the District Court of Kansas. *Id.* The court conditioned the dismissal on defendants filing affidavits binding them to the following conditions: (1) producing their respective employees, officers and records in France, at their own cost; (2) making good faith and reasonable efforts to obtain the attendance of former employees and officers, including offering to pay the witnesses' reasonable travel expenses; (3) waiving any limitations defenses that would not have been available to them had plaintiff initiated her litigation in France; (4) transporting, at their own cost, all physical evidence brought from Europe back to France; (5) promptly and voluntarily entering their appearance before the court when plaintiff initiates her litigation in France; and (6) consenting to reinstatement of this case in its present posture before the District Court of Kansas, without prejudice to plaintiff, in the event the French courts refuse to accept jurisdiction over the matter. These affidavits were submitted and the case was dismissed on May 7, 1997. (Aplt. App. 372-382).

Plaintiff appealed the District Court's *forum non convenicns* decision to the Court of Appeals for the Tenth Circuit. After receiving briefs from the parties and conducting oral argument, the Tenth Circuit affirmed the District Court's decision. (App. 15a). The Court of Appeals stated that the standard of review for a *forum non conveniens* decision is abuse of discretion:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion. Where the court has

> considered all relevant public and private interest factors and where its balancing of these factors is reasonable, its decision deserves substantial deference.

See Piper, 454 U.S. at 257.

The Court of Appeals began its analysis by considering the two threshold questions in a *forum non conveniens* determination: (1) whether there is an adequate alternative forum in which the defendant is amenable to process; and (2) whether foreign law applies. (App. 6a). Answering the first question, the court noted that defendants Cessna and Pratt & Whitney agreed to be subject to suit in France, a concession that is generally enough to make the alternative forum available under the law as stated in *Piper*. (App. 7a). The court went on to consider — and ultimately reject — several arguments raised by plaintiff as to the alleged unavailability of France as an alternate forum. (App 8a-10a). For example, the court noted that French law recognizes product liability and wrongful death actions, that Plaintiff herself admitted in the record that she could bring a viable action against defendants in French courts, and that the District Court conditioned its dismissal on defendants' consent to have the action reinstated in the District of Kansas if the French courts refuse jurisdiction. (App. 8a). The court also found no error in the District Court's conclusion that French law is adequate. (App. 9a).

With respect to the second threshold question — choice of law — the Court of Appeals noted that its review of that issue is de novo. (App. 10a). After independently reviewing the record and applicable law, the court agreed with the analysis and conclusion of the District Court that French law would apply to this case. (App. 10a).

The Court of Appeals then reviewed the District Court's weighing of the *Gulf Oil* private interest factors. Plaintiff had argued that the District Court erred in analyzing the first private interest factor: relative ease of access to sources of proof. The District Court had held that this factor favored a French forum because most of the evidence relevant to defendants' claim that the decedent was either contributorily negligent or committed suicide was more readily available in France. (App. 30a-31a). This evidence included, among other things, accounts of the decedent's business dealings. The Court of Appeals held that this conclusion was not clearly erroneous and that the District Court did not abuse its discretion in weighing this factor in favor of defendants. (App. 11a).

Plaintiff made other arguments contending that the District Court erred in weighing the private interest factors, but these were also rejected by the Court of Appeals. For example, contrary to plaintiff's contentions, the Court of Appeals found no error in the District Court's statement that Plaintiff's choice of an American forum "deserves less deference" because she is a foreigner. (App. 11a-12a). The Court of Appeals also found that the District Court did not abuse its discretion by failing to note that Cessna, a party seeking dismissal, was a forum resident. (App. 12a).

The Court of Appeals next considered plaintiff's challenges to the District Court's evaluation of the relevant *Gulf Oil* public interest factors. First, the court held it was not an abuse of discretion for the District Court to place reliance on the fact that "[a]llowing the case to proceed in this court will unduly contribute to the congestion of the court's docket." (App. 12a). Second, in response to plaintiff's argument that the District Court placed too much reliance on

its unfamiliarity with French law, the Court of Appeals found the District Court to have acted within its discretion because it did not consider that factor to be dispositive. (App. 13a).

Finally, the Court of Appeals considered plaintiff's argument that defendants failed to provide a sufficient factual record in support of its *forum non conveniens* motions. The court devoted a large part of its opinion to this argument. (App. 13a-14a). It began by repeating the standard set forth in the *Piper* case — that a defendant seeking dismissal for *forum non conveniens* must provide "enough information to enable the District Court to balance the parties' interests." *See Piper*, 454 U.S. at 258. (App. 13a–14a). The court noted that that determination "depends on the facts of the particular case." (App. 14a).

Applying this standard to the facts at hand, the Court of Appeals recognized that defendants had provided documentary evidence in support of their theory that the decedent had been having financial difficulties shortly before his death, and that he may have taken his own life in the crash. (App. 14a, *citing* Aplt. App. 293-295). The Court of Appeals also recognized that defendants provided the District Court with a copy of pertinent articles of the Hague Evidence Convention, which shed light on the ability of the United States to compel attendance of unwilling foreign witnesses. Accordingly, the court held, in the context of this case, that the items offered by defendant Cessna gave the District Court enough information to conduct the necessary balancing. (App. 14a). The Court of Appeals found no abuse of discretion in this regard.

Based on the foregoing analysis, the Tenth Circuit Court of Appeals AFFIRMED the dismissal of this case on *forum*

non conveniens grounds. (App. 15a). Plaintiff then filed a Petition for Rehearing and Suggestion for Rehearing in Banc, which was considered and denied by the Court of Appeals on November 10, 1998.

REASONS FOR DENYING THE WRIT

A petition for writ of certiorari will be granted only for compelling reasons. Sup. Ct. R. 10. A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *Id.* Under these governing standards, Respondent Pratt & Whitney respectfully opposes the granting of certiorari in this case. Contrary to plaintiff's contentions, the decision reached by the District Court and affirmed by the Tenth Circuit does not have far reaching implications in *forum non conveniens* jurisprudence. Moreover, the Tenth Circuit's affirmance of the District Court's dismissal does not, in any way, create a conflict between the circuits. Instead, this case is simply a good example of a District Court and Court of Appeals properly performing the *forum non conveniens* analysis outlined by this Court in *Piper v. Reyno*, a strikingly similar *forum non conveniens* case decided less than two decades ago.

I.

THE TENTH CIRCUIT'S DISMISSAL DOES NOT CREATE A NEW STANDARD FOR *FORUM NON CONVENIENS* CASES AND DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

Plaintiff makes several arguments in an attempt to demonstrate that this case presents an important question necessitating review by the Court. Plaintiff's arguments are without merit.

First, and certainly the main thrust of plaintiff's Petition as it relates to *forum non conveniens*, is the argument that the factual evidence presented by defendants in support of their *forum non conveniens* motions is insufficient. Plaintiff contends that the Tenth Circuit's holding lessens the factual showing required to be made by a moving party and

> drastically revised the governing *forum non conveniens* standard to one which ignores a moving party's burden of proof and the duty of the court, trial and reviewing, to thoroughly survey the record to balance convenience and to ascertain whether that balancing was reasonable.

(Pet. at 14).

Contrary to plaintiff's contentions, the decisions below do not create a new standard governing factual support for *forum non conveniens* motions. Instead, the District Court and the Court of Appeals simply followed the teachings of *Piper*. The clear holding from *Piper* is that the moving party must provide enough information to enable the District Court

to balance the parties' interests under the *Gulf Oil* public and private interest factors. *Piper*, 454 U.S. at 258. The District Court held, and the Court of Appeals agreed, that the support offered by defendants met this standard.

For example, defendant Cessna provided the District Court with French lawsuit papers detailing evidence of decedent's financial problems. Cessna also provided the District Court with a handwritten note suggesting that decedent committed suicide in the crash. The District Court considered these pieces of evidence before reaching its conclusion that evidence relevant to defendants' claims of suicide and contributory negligence is more readily available in France. (App. 31a). Moreover, Cessna provided the District Court with several pertinent pages of the Hague Evidence Convention (Aplt. App. 65-68).[2] This evidence was thoroughly analyzed by the District Court in balancing the parties' interests, as several pages of the District Court's opinion were devoted to the compulsory process issue, much of which centered around the effect the Convention has on the ability, or lack thereof, of a United States court to compel unwilling foreign witnesses. (App. 31a–35a).

In concluding that the evidence presented by defendants was sufficient to enable the District Court to balance the parties' interests, the Court of Appeals was careful to distinguish the instant case from a case where a moving defendant *presents no supporting evidence whatsoever.* Indeed, the Court of Appeals clearly recognized the distinction between *no* evidence and a *minimum amount* of evidence:

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2. Hague Evidence Convention, opened for signature March 18, 1970, art. 2, 23 U.S.T. 2555, 2558, T.I.A.S. No. 7444, at 4, 847 U.N.T.S. 231, 241

> Admittedly, Defendants have presented a bare minimum of evidence necessary for the court to conduct an informed balancing of factors. This court certainly would have benefited from additional evidence in the record. Nevertheless, in the context of this case, the items offered by defendant gave the district court enough information to conduct the balancing, and we find no abuse of discretion.

(App. 14a). Thus, plaintiff is wrong when she argues that a bare minimum of evidence is tantamount to no evidence at all. (Pet. 15). As long as there is enough evidence to balance the factors, the *Piper* standard has been satisfied and it makes no difference if the quantity of evidence supplied is considered a "minimum" or "maximum" amount.

Plaintiff also argues that the decision below conflicts with post-*Piper* cases from other circuits, as well as another Tenth Circuit opinion, with regard to the amount of factual support needed. A reading of these cases, however, reveals that no such conflict exists. Each of the cases cited by plaintiff involved a situation where the defendant did not supply *any* evidence in support of its *forum non conveniens* motion. *See, e.g., Rivendell Forest Products, Ltd. v. Canadian Pacific, Ltd.*, 2 F.3d 990, 993 (10th Cir. 1993) ("no evidence . . . whatsoever" in support of motion to dismiss)[3]; *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 (8th Cir. 1990) (defendants did not provide any facts, by way of affidavit or other information, to support their motion); *Lacey v. Cessna*

3. Even if there was a conflict between the instant decision and *Rivendell*, it would not support a granting of certiorari. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties").

Aircraft Co., 862 F.2d 38 (3rd Cir. 1988) (defendants did not supply any information to support allegations that pilot error may have been a factor in the crash). These cases are distinguishable and are not in conflict with the decisions reached by the District Court and Court of Appeals in the instant case.

Finally, plaintiff argues that the District Court made sweeping factual conclusions with regard to the location of certain categories of witnesses and documents. (Pet. 6). Even if this contention were true, which respondent denies, it would not support the granting of certiorari. With *forum non conveniens*, "each case turns on its facts." *Piper*, 454 U.S. at 249; *citing Williams v. Green Bay & Western R. Co.*, 326 U.S. 549, 557 (1946). The District Court's decision, which is entitled to substantial deference, turned on the particular facts of this case and is not the type of decision to create future detrimental consequences in *forum non conveniens* jurisprudence. Therefore, this case is not appropriate for review. *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("this is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other").

II.

THE ALLEGED SUBJECT MATTER JURISDICTION ISSUE DOES NOT MANDATE THE REVERSAL OF THE TENTH CIRCUIT'S *FORUM NON CONVENIENS* DISMISSAL

Plaintiff argues that the Court's intervention is warranted because the Tenth Circuit has held *forum non conveniens* to

apply in the absence of jurisdiction. (Pet. 13). Respondent disagrees with this position. Although respondent is not willing to concede that the federal courts lack subject matter jurisdiction, even assuming *arguendo* that no jurisdiction exists, the Court should not nullify the *forum non conveniens* holding under the particular facts of this case. Under existing authority, the District Court, the Court of Appeals, and this Court all have the authority to uphold the *forum non conveniens* dismissal despite the alleged jurisdictional inadequacies by simply dismissing respondent Pratt & Whitney. *See Kamel v. Hill-Rom Company, Inc.*, 108 F.3d 799 (7th Cir. 1997).

The *Kamel* case is on all fours with the instant case. In *Kamel,* the plaintiff was a citizen of Saudi Arabia who brought suit against an Indiana corporation (Hill-Rom) and an individual named Chedid, who was a citizen of Ohio but an American expatriate. *Id.* at 801, 805. Because Saudi Arabia was a more convenient forum, defendant Hill-Rom moved to dismiss on the grounds of *forum non conveniens.* The District Court granted defendant's motion to dismiss and the plaintiff appealed.

On appeal, the Seventh Circuit first conducted a thorough *forum non conveniens* analysis and held that the District Court had not abused its discretion in dismissing the case. *Id.* at 802-05. The court then, apparently *sua sponte*, considered the effect Chedid's presence had on the court's subject matter jurisdiction. *Id.* at 805. Since Chedid was an American expatriate, the court concluded he was technically "stateless" and that his presence destroyed complete diversity under 28 U.S.C. § 1332(a)(3). The court therefore concluded that the district court lacked jurisdiction to rule on Hill-Rom's *forum non conveniens* motion because Chedid was a party to the action. *Id.* at 805.

Despite this jurisdictional deficiency, however, the *Kamel* court did not nullify the *forum non conveniens* dismissal, as plaintiff urges the Court to do in the instant case. Instead, the *Kamel* court recognized that, under the authority stated in *Newman-Green, Inc. v. Alfonzo Larrain*, 490 U.S. 826 (1989), an appellate court has the power to dismiss a dispensable party whose presence sullies statutory diversity jurisdiction. *Id.* Pursuant to this authority, the *Kamel* court upheld the *forum non conveniens* dismissal:

> An appellate court should carefully consider whether the dismissal of a non-diverse party will prejudice any of the parties in the litigation. . . . In this case, we need not fret about dismissing Chedid because this suit will not continue after his dismissal. That is, because we are dismissing Chedid only to attain subject matter jurisdiction to affirm a forum non conveniens dismissal, neither we nor the district court on remand would have to decide the merits of Kamel's case. By our affirming the dismissal of Kamel's case on the basis of forum non conveniens, Kamel necessarily will have to pursue his claims against both Hill-Rom and Chedid in a Saudi Arabian tribunal anyway. Ergo, Chedid's dismissal will not prejudice any parties.
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> * * *
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> For the foregoing reasons, we AFFIRM the district court's granting Hill-Rom's Motion to Dismiss on the basis of forum non conveniens.

Id. at 805-06.

Accordingly, there is no need for the Court to intervene in this case for the purpose of nullifying the Tenth Circuit's *forum non conveniens* decision, even if there is lack of jurisdiction as to Pratt & Whitney as plaintiff contends. Any jurisdictional problem could simply be corrected by the dismissal of Pratt & Whitney, so as to preserve the well-reasoned *forum non conveniens* dismissal advocated by both the District Court and Court of Appeals under the particular facts of this case. Any litigation arising out of decedent's plane crash should take place in a French court.

CONCLUSION

For the foregoing reasons, respondent Pratt & Whitney Canada Inc. urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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